Supreme Court, U.S.
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No. 00-168

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2000

CHEMICAL & ALLIED PRODUCT WORKERS' UNION
LOCAL 20, AFL-CIO,

Petitioner,

vs.

JAYS FOODS, L.L.C.,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Jays Foods, L.L.C. advises the Court that it has no parent company, corporate subsidiaries, or affiliates.

PARTIES BELOW

The Plaintiff-Appellee below (and Respondent here) was Jays Foods, L.L.C. The Defendant-Appellant below (and Petitioner here) was Chemical & Allied Product Workers' Union, Local 20, a/w International Union of Allied Novelty and Production Workers, AFL-CIO.

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OPINIONS BELOW

Jays Foods, L.L.C. v. Chemical & Allied Products Union, Local 20, 208 F.3d 610 (7th Cir. 2000).

STATEMENT OF JURISDICTION

(i) The Judgment of the United States Court of Appeals for the Seventh Circuit which Petitioner seeks to have reviewed by this Court issued on March 31, 2000.

(ii) Petitioner filed a petition for rehearing and for rehearing *en banc*, which was denied by the United States Court of Appeals for the Seventh Circuit on April 28, 2000.

(iii) No cross-petitions for writ of certiorari have been filed.

(iv) The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

9 U.S.C. § 16; 28 U.S.C. § 1291; 28 U.S.C. § 1292.

STATEMENT OF THE CASE

This case has a unique history resulting from problems entirely of Petitioner's own making. In this regard, Petitioner Chemical & Allied Product Workers' Union, Local 20 a/w International Union of Allied Novelty and Production Workers, AFL-CIO ("Union"), has omitted significant facts from its statement of the case.

On September 3, 1997, Respondent Jays Foods, L.L.C. ("Jays" or "Company") filed a complaint in the United States District Court for the Northern District of Illinois to vacate a labor arbitration award. Jays then moved for judgment on the pleadings under Fed.R.Civ.P. 12(c). The Union filed a counterclaim and motion to confirm the award. (Appendix to Petition at 2a).

In an Order and Opinion dated May 11, 1998, the District Court granted Jays' motion, denied the Union's motion, and vacated the arbitration award. (*Id.* at 2a, 9a-11a, 14a). The District Court remanded the matter to the arbitrator "for further determination consistent with [the District Court's] opinion," and "terminat[ed the] case." (*Id.* at 2a-3a, 14a). The Union did not file a timely notice of appeal with respect to the May 11, 1998 Order and Opinion.

On remand, the arbitrator issued a second award denying

the Union's grievance. (*Id.* at 2a). On August 19, 1998, ***more than three months*** after the District Court's remand Order issued (and well after expiration of Fed.R.App.P. 4's 30-day period for filing a notice of appeal), the Union filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit. (*Id.* at 3a-4a). On December 15, 1998, the Seventh Circuit dismissed the Union's appeal, and ordered that "[t]he parties must proceed back through the federal courts to confirm or vacate the second [arbitration] award[.]" (*Id.* at 12a-13a).

The Union did *not* file a petition for writ of certiorari with this Court seeking review of the Seventh Circuit's December 15, 1998 dismissal. Nor did the Union follow the proper procedure for vacating an arbitration award – a complaint in the District Court – with respect to the second award. Indeed, the Seventh Circuit explicitly directed the Union to follow this procedure in order to challenge the second award. (*Id.* at 6a-7a, 12a-13a). Inexplicably, the Union ignored the Seventh Circuit's directive, and instead filed a motion for a "Rule 54" order of judgment in the District Court – a wholly inapposite procedural mechanism. (*Id.* at 6a-7a). But there was no pending proceeding in the District Court, which had relinquished jurisdiction over the controversy when it sent the case back to the arbitrator. Not surprisingly, therefore, the District Court denied the Union's motion on the ground that there was no case before it. (*Id.* at 7a). The Union thereafter appealed, and the Seventh Circuit affirmed. It is this decision, flowing directly from its disregard of the

Seventh Circuit's instructions, for which the Union seeks this Court's review.

REASONS FOR DENYING THE WRIT

I.

REVIEW OF QUESTION I IS INAPPROPRIATE BECAUSE THE PORTION OF THE SEVENTH CIRCUIT'S OPINION FOR WHICH PETITIONER SEEKS REVIEW IS DICTA

Question I – the Union's assertion that the Seventh Circuit "exceeded its statutory authority by declaring a category of interlocutory orders appealable as a matter of right" – does not warrant this Court's review. A writ of certiorari is clearly unnecessary where the Union is seeking this Court's review of dicta, and a ruling in the Union's favor would not change the outcome of the case.

The Union argues that the Seventh Circuit should not have considered the District Court's May 11, 1998 vacatur Order to be an interlocutory order that could be appealed at the end of the entire litigation. But the portion of the Seventh Circuit's decision about which the Union complains is dicta. The Seventh Circuit's *holding* is that the District Court's May 11, 1998 vacatur Order was immediately appealable pursuant to the Federal

Arbitration Act, 9 U.S.C. § 16(a)(1)(E) (Appendix to Petition at 3a-4a). The Union, however, did not file a notice of appeal regarding the District Court's May 11, 1998 Order until August 19, 1998 – long after the expiration of Fed.R.App. 4's 30-day appeal period. (*Id.*).

Thus, even if this Court were to issue a writ of certiorari and accept the Union's argument, it would do the Union no good. The unalterable fact – which the Union does not challenge – is that, as the Seventh Circuit found, the Union filed an untimely appeal of the District Court's May 11, 1998 Order vacating the first arbitration award. Consequently, the Union waived any right it had to the Seventh Circuit's (and this Court's) review of the District Court's vacation of that award in the Union's favor.

Further, contrary to the Union's contention, the Seventh Circuit did not "create" a "new category of case for which interlocutory appeals may be taken without regard to the provisions of 28 U.S.C. Section 1292." (Petition at 10). Rather, the Seventh Circuit adhered to the fundamental (and unremarkable) principle that at the time the Court of Appeals reviews a final judgment, the parties may appeal all non-moot, non-final orders issued along the way. Moreover, the unique procedural history of this case (two appellate proceedings but only one underlying litigation, *see* Appendix to Petition at 6a) is unlikely to be repeated, given the Seventh Circuit's admonition that arbitral remand orders are immediately appealable under 9 U.S.C. § 16(a)(1)(E). Accordingly, there is no compelling reason for this Court to review any aspect of this case.

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS REQUIRING THIS COURT'S REVIEW

With respect to the Union's Question II, there is no conflict among the Circuits requiring resolution by this Court. Again, the Seventh Circuit's holding was that the District Court's May 11, 1998 Order vacating the first arbitration award and remanding the case to the arbitrator was immediately appealable under 9 U.S.C. § 16(a)(1)(E). (Appendix to Petition at 3a-4a). This is in full accord with the decisions from other Circuits which the Union cites. *See* Petition at 12 (citing *Virgin Islands Housing Authority v. Coastal General Construction*, 27 F.3d 911, 914 (3d Cir. 1994); *Union Pac. R. Co. v. United Transportation Union*, 3 F.3d 255, 258 (8th Cir. 1993); *Forsythe International, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1020 (5th Cir. 1990)). The rest of the Seventh Circuit's procedural discussion (other than to reiterate that the Union never instituted an action to challenge the second arbitration award) was dicta, having no bearing on the outcome of the case.

In this regard, the Union conveniently forgets that it waived any right to appellate review of the District Court's May 11, 1998 vacatur Order by failing to bring a timely appeal. As to the second arbitration award, the Union likewise failed to follow the Federal Rules of Civil Procedure, and the Seventh

Circuit's express direction for obtaining judicial review. Instead of filing a complaint challenging the second award, the Union sought a "Rule 54 order" (the substance of which was never identified by the Union) when there was no case pending before the District Court. Hence, even if this Court were to agree with the Union that the District Court's vacatur Order should not have been deemed "interlocutory," it would not help the Union. The Union did not perfect a timely appeal as to the District Court's original decision, and it did not properly institute an action to vacate the second arbitration award. The Union's actions and inactions make this case ill-suited for review by this Court.

CONCLUSION

For the reasons stated above, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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